APPENDIX A.

Contract Disputes Act of 1978; Effect in Reconverting Claims Remediable Under the Contract to Breach Claims.

IN THE UNITED STATES COURT OF CLAIMS

No. 435-81C.

JOHNSON & SONS ERECTORS COMPANY,

v.

THE UNITED STATES.

Filed: June 18, 1982.

Dean Francis Pace, attorney of record, for plaintiff. Pace & Johnson, of counsel.

John C. Ranney, with whom was Assistant Attorney General J. Paul McGrath, for defendant.

Before COWEN, Senior Judge, DAVIS AND NICHOLS, *Judges*.

ORDER

This case is stated in the petition to be one for review of a decision by the Armed Services Board of Contract Appeals (ASBCA) both under the Wunderlich Act, 41 U.S.C. § 321, and under the Contract Disputes Act of 1978, 41 U.S.C. § 601 and ff (CDA). Defendant's Department of the Air Force awarded plaintiff a construction contract, F 35610-76-C-0100, on August 28, 1975. Disputes arose and plaintiff filed claims for equitable adjustments on various theories, and for breaches, including government-caused delay. The contracting officer issued a decision February 13, 1979. The effective date of the CDA was March 1 of that year. On

March 14, 1979, the contractor appealed, and the ASBCA assigned it number 23689. The board ruled that these claims were not pending before the contracting officer on March 1 and, therefore, the broadening of its jurisdiction effected in the CDA was not applicable. Section 16 of Pub. L. No. 95-563. The contractor again presented virtually the identical claims to the contracting officer in December 1979. He refused to decide alleging he had already made his final decision. The contractor appealed from this refusal and the board numbered this appeal 24564. The board considers that this second appeal validly puts before it certain claims that the first one does not, *i.e.*, those which it did not have cognizance under the prior law, but did under the CDA.

Defendant moved to dismiss No. 24564 on the ground that it was "merely duplicative" of No. 23689. By opinion dated June 3, 1980, the board denied this motion, holding that the contractor had resorted to a permissible procedure to bring before the board breach and reformation claims not previously within its cognizance, but made so by the new law. The board noted later that the two sets of claims were substantially identical so far as concerned the facts of the wrongs complained of. The lack of identity resided in the fact that the later claims were founded on a different legal theory.

The board, later in a decision of December 30, 1980, *Johnson & Son Erectors Co.*, 81-1 BCA (CCH) ¶ 14,880, reaffirmed on motion for reconsideration March 31, 1981, 81-1 BCA (CCH) ¶ 15,082, allowed a government motion to strike from both appeals all references to contract breaches wherever a contract clause existed that would provide a means for an equitable adjustment if the contractor established entitlement to one, retaining only allegations of breach of procurement regulations and breach by government-caused delay, there being, as to the latter, no contract clause for "suspension of work." These retentions were limited to Appeal No. 24564 only. The breach issues excluded from both appeals were defective and ambiguous specifications, withholding of superior knowledge, and impossibility of performance. The board construed contract

clauses as providing for equitable adjustments if grievances of these characters were established factually, and it took the view that whatever was otherwise established as a contract breach was not a breach if it was remediable under the contract.

The immediate practical consequence of this view is to throw all those latter classes of claims into the earlier appeal, No. 23689, because the board had cognizance of them when first presented in that appeal, without the aid of the CDA. This in turn withdraws from plaintiff in proving these claims the benefit of the board's new nationwide subpoena power under 41 U.S.C. § 610 and remits plaintiff to the more cumbersome and costly procedure that previously obtained, by which the United States District Court of the district where the witness resided had to issue the subpoena. This seems to be what this possibly over hasty appeal to us is really about. Plaintiff has no clear perception that the measure of damages is different, but the accrual of interest may be, however, the contract provides for interest as generally contracts of its date did. Plaintiff is a small business and has been bankrupted by this contract, o finding the most inexpensive manner of litigating is vital to its ability to maintain the suit.

Since the board can subpoena some witnesses in connection with the remaining breach claims under Appeal No. 24564, and since under § 610 it will be necessary to resort to a district court if a subpoenaed witness is recalcitrant, it is at this point anyone's guess what added cost, if any, plaintiff will incur. We suppose defendant will produce without subpoena all witnesses under its control. In connection with the impossibility issue, there will be third parties having needed information.

At any rate, plaintiff-appellant appeals the grant of defendant's motion to strike. In response to defendant's obvious response that this is an interlocutory matter and the recourse to this court, whether by way of Tucker Act petition under former law, or appeal under the new law (apparently it is both), is obviously premature and unauthorized, plaintiff says the order of the board is final so far as it bars prosecution of breach claims before the board if they are in the categories stated. By this view, the finality of the order is not impaired by the fact that only procedure, not substance is shown to be directly affected. In view of the novelty of the issue and the fact it arises as incident to the transition to operations wholly covered by the new law, we are willing to assume that plaintiff is right. Defendant cites no case that is open and shut to the contrary.

On the legal substance of its contention, plaintiff-appellant says that the whole theory of constructive changes in contracts is a "legal fiction" invented to enable contract appeal boards to do justice in what are really breach cases. Now that in the CDA the Congress has broadened board jurisdiction so boards can do all that courts could do in government contract cases, the need for this fiction is past and therefore it must be considered swept away. What looks like a government breach and would be a breach but for a contract exculpatory clause, can be dealt with as a breach by the contractor and by the board. We are not entirely clear whether plaintiff would override exculpatory clauses entirely, or only when the use of them involves invention of a fiction that something has occurred that in fact has not occurred: a formal change order or formal suspension of work, for example, where a suspension of work clause exists. In either event, the position ignores history and imputes to Congress intent to achieve a sweeping change of which it gave no notice.

By plaintiff-appellant's view, Congress provided a new board remedy in disregard of contract clauses, and Appeal No. 24564 must be held to invoke a power the board now has to consider withholding of superior knowledge, impossibility, etc., as breach issues whether or not in pre-Dispute Act days they were remediable under contract clauses also found in the contract under review.

The various clauses that provide for contract equitable adjustments, and the disputes clause, were put there for purposes highly important to the government as well as to the contractor, among which the issue of board jurisdiction was minor. If a board could not remedy a breach, a court could. One major purpose is to keep the work going at all events, despite controversies that may arise. This holds good even to the point of giving important legal consequences to a legally erroneous contracting officer's decision. *Broad Avenue Laundry and Tailoring v. United States*, Ct.Cl. Appeal No. 28-81 (decided June 16, 1982.) What would otherwise be breaches are converted into claims for equitable adjustment, compensable under the contract. A contractor having a breach issue not so compensable may be obliged to declare the contract at an end and cease performance in order to avoid a waiver and save its rights. *E.g., Ling-Temco-Voight, Inc. v. United States*, 201 Ct.Cl. 135, 475 F.2d 630 (1973). A horrible example of the consequences of this happening is afforded by *Spearin v. United States*, 51 Ct.Cl. 155 (1916), *aff'd*, 248 U.S. 132 (1918) (per Justice Brandeis). There, in a petty dispute about relocating a sewer line, the contractor, Spearin, had to cease work and declare the contract at an end in order to protect his rights, as change order and disputes clause procedure was unavailable in that class of case at that date. A dispute over work that could have been done for $3,875 thus led to the government being mulcted $141,180.86 in breach damages plus

the earnings of reprocurement contractors, plus a long delay in completing a much needed defense facility. *See* II *The United States Court of Claims, a History* (1978) at 40, bound in 216 Ct.Cl. The benefits from use of these remedial articles to keep things going and restrict damages is further explicated in *General Dynamics Corp. v. United States*, 218 Ct.Cl. 40, 585 F.2d 457 (1978). The suspension of work clause introduced in many government contracts (though not this one at bar) was later drafted and made standard to extend these benefits to instances of unreasonable delay in completion of the work caused by the government. *Merritt-Chapman & Scott Corp. v. United States*, 208 Ct.Cl. 639, 528 F.2d 1392 (1976). As is there shown, it was always intended that the advantages would extend to cases when no actual suspension order issued, and in such cases a constructive, or in plaintiff's phrase, fictitious order would be postulated. Call it fictitious if one will, that does not make it less useful. The equitable adjustment in that case covered injury that a real suspension order would have avoided, keeping men and equipment mobilized during the suspension period as the absence of any real suspension order made necessary.

Plaintiff would have it that in enacting the CDA, Congress swept away all these benefits without being advised by anyone to do so and without saying it was doing so. This proposition is wholly untenable. We hold, on the contrary, that the legal effectiveness of the clauses involved in converting what would otherwise be breach claims into claims for contract equitaole adjustments is unaffected by whether the litigation is under the Contract Disputes Act or not. Being allowed to make a new appeal, No. 24564, and thereby invoke the board's new jurisdiction over breach cases, does not mean the contractor can now reconvert

equitable adjustment claims to breach claims. The clauses that previously barred its doing this do so still.

Plaintiff stresses before us that the board's bifurcation of the case and its handling of it, partly under the old law, in Appeal No. 23689 and partly under the new law in Appeal No. 24564, will increase its costs and make litigation by an already bankrupt litigant more costly. Plaintiff enjoys the simplified procedure of the new law in part only, and to the extent of that part only, is better off than if the Contract Disputes Act had never been enacted. This one of many instances of unfortunate complexity that have arisen in transitional cases. As we point out in another even more complex such case. *Warwick Construction, Inc. v. United States*, Ct.Cl. No. 83-80C (order entered August 29, 1980), the CDA joins with the other available waivers of sovereign immunity and consents to suit in contract cases. Like the others, it must be strictly construed and carried out by courts and boards according to its terms, if cases are to remain within their jurisdiction. The board here appears to us to have done exactly what it was required to do. Neither the board nor ourselves are given authority to modify contract disputes procedure required by statute in order to relieve hardship.

We have not been asked to consider, and have not considered, whether the board is right in thinking that it has jurisdiction to award equitable adjustments under the contract changes articles in instances, if established, of alleged defective specifications, withholding of superior knowledge, and impossibility. We are not given any detail and of course we do not know whether the facts, when proven, will bring the claims within the clauses. It is not impossible they will, not impossible that in some circumstances they will be breach claims after all, but the board is entitled to the prior opportunity to investigate appeal allegations prop-

erly before it and determine the nature of the claims in light of the facts found. Our decision is not to be taken as holding that they or any of them are necessarily contract remediable. If any of these claims turn out to be breach claims only, they can be reinstated in Appeal No. 24564. We are only holding at this time that the ability of the board to deal with these claims as claims under the contract is not impaired by the CDA, and that, where they can be so dealt with, they must be, because a claim remediable under a contract clause is not a breach and cannot be remediable as a breach.

Accordingly, defendant's motion to dismiss is granted and the petition is dismissed.

Dated: June 18, 1982.

BY THE COURT

/s/ Philip Nichols, Jr.

PHILIP NICHOLS, JR.

Judge

APPENDIX B.

Opinion by Adminstrative Judge Norris on Motion for Reconsideration.

ARMED SERVICES BOARD OF
CONTRACT APPEALS.

Appeal of —
Johnson & Son Erectors
Under Contract No. F35610-76-C-0010.
ASBCA No. 24564.

APPEARANCES FOR THE APPELLANT:
Dean Francis Pace, Esq.
Pace & Johnson
Los Angeles, California.

APPEARANCES FOR THE GOVERNMENT:
Colonel John T. Murphy, USAF
Chief Trial Attorney
Major J. Hatcher Graham, USAF
Senior Trial Attorney.

On 30 December 1980 we issued an opinion regarding respondent's Motion for Summary Judgment. That motion sought the deletion from ASBCA No. 24564, a Contract Disputes Act of 1978 case, of all allegations which could be remedied under ASBCA No. 23689, an appeal perfected prior to the effective date of the Contract Disputes Act of 1978. The problem which respondent sought to remedy was the alleging of certain facts in ASBCA No. 23689 and the seeking of relief on those facts on the basis of constructive changes and then the alleging of the identical facts in ASBCA No. 24564 and the seeking of relief on those same facts on the basis of breach of contract.

We granted respondent's motion and ordered appellant to delete all allegations which could be remedied under

ASBCA No. 23689 from ASBCA No. 24564. Once this was done, there would be two allegations which were not remediable under ASBCA No. 23689 left in ASBCA No. 24564.

Appellant now seeks our reconsideration of our decision stating that it is contrary to law. Appellant argues that the Court of Claims has ruled that there are implied warranties in contracts. These according to appellant include:

1. Implied warranty of the adequacy of specifications.

2. Implied warranty of the duty to disclose superior knowledge.

3. Implied warranty to act with reasonable diligence.

4. Implied warranty not to hinder the performance of the other party.

Appellant also argues that the Court of Claims has ruled that the breach of an implied warranty, including specifically those listed above, constitutes a breach of contract.

Of course, appellant is absolutely correct in those arguments but our agreement with those arguments does not resolve this matter. This and other boards of contract appeals, have held in numerous cases that the breaching of an implied warranty, including specifically those listed above, authorizes the contractor to an equitable adjustment under the Changes clause of the contract on the basis of a constructive change in the contract's terms.[1]

The appellant is before this Board with two appeals. One is a pre-Contract Disputes Act of 1978 case in which appellant had no right to elect to proceed under the Act. The other is under the Contract Disputes Act. The only question

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[1]For a general discussion of the constructive change theory or doctrine and its recognition by the Court of Claims see *Len Company and Associates v. United States*, 181 Ct. Cl. 29, 385 F.2d 438 (1967).

that is before us is whether appellant can allege the identical facts in both cases and use the same facts to prove in one case a constructive change and in the other a breach of contract.

The answer to that question is no. Appellant will, of course, be permitted to introduce all of the material and relevant evidence necessary to establish its entitlement to recovery but assuming that the evidence adduced is sufficient to establish entitlement we would find entitlement under the contract not outside of it. It has long been the policy of this Board to seek a remedy under the contract. The constructive change doctrine is, perhaps, the foremost example of our commitment to providing relief under the contract whenever it is possible to do so.

If we were to grant appellant's motion and permit appellant to present evidence which could arguably prove both a constructive change and a breach of contract what problem would then be presented? Of course the problem would be under which theory would appellant recover. The same rule which we have set forth above would again come into play. We would provide an equitable adjustment under the terms of the contract and not relief in the nature of breach of contract damages. There can be no doubt appellant would not be entitled to both an equitable contract adjustment and breach of contract damages simply because it sued on both a constructive change theory and a breach of contract theory. However many theories of recovery might be advanced, there would have been only one wrong and, of course, only one recovery to set the wrong right. In *Hol-Gar Manufacturing Corporation v. United States*, 175 Ct. Cl. 518, 360 F.2d 634 (1966) the Court of Claims recognized this point.

As we said in our original decision, every allegation made by appellant, except two, is remediable under some provision of the contract either directly or under the constructive

change doctrine. The law is now well-settled that, in one sense, if a "breach" is remediable under the contract it is not a breach of contract. There is some artificiality in this concept but it is a necessary, practical and accepted one. No good purpose would be served here by a review of the cases which have so held, in one context or another. The Court of Claims in *George Bennett, an individual d/b/a George Bennett Construction Company*, 178 Ct. Cl. 61, 69; 371 F.2d 859, 864 (1967) said that

> [t]he term 'breach of contract' as used in the cited authorities refers to a breach which is not actionable under the disputes clause . . .

Obviously the other side of the coin is that if an alleged breach is actionable under the Disputes clause it is not a breach of contract.

The cornerstone of appellant's Motion for Reconsideration and the underpinning of its argument is that it has two causes of action arising out of the same set of facts. Its first cause of action, it says, is under the Disputes clause of the contract on a constructive change basis while the second is under the Contract Disputes Act of 1978 on a breach of contract basis. If the cornerstone and underpinning give way, appellant's entire case crumbles and falls. Appellant's basic thesis is incorrect and thus the remainder of its argument premised on that thesis is also incorrect.

We conclude that there are not two causes of action but only one and that that one is under the contract on a constructive change basis. Obviously we reach this conclusion on the premise that if the allegations are remediable under the terms of the contract they are not breaches of contract. If there are no breaches of contract there are not two causes of action but only one cause of action.

We have tried to emphasize that we consider that an action is redressable under the contract regardless of whether it is by direct application of a contract provision or by means of the constructive change doctrine. Our conclusion finds support in the Court of Claims opinion in *George Bennett, supra*. The Court said:

> . . . For here, the claim sued on is one which arises under the contract, i.e., it was amenable to administrative relief through the vehicle of a 'constructive change' . . .

(at p. 69-70; 864)

We find support for our views also in the Court of Claims opinion in *Edward K. Marden Corporation v. United States*, 194 Ct. Cl. 799, 442 F.2d 364 (1971). There the contractor had alleged two different claims; one under the contract and one as a breach of contract, relying on the identical or almost identical facts. The Court said:

> This situation seems much like that with which the court was confronted in *L. W. Foster Sportswear Co. v. United States*, 186 Ct. Cl. 499, 405 F.2d 1285 (1969). There the plaintiff, which had contracted with the Navy to manufacture 54,000 goatskin flying jackets, had requested the contracting officer to make an equitable adjustment in price under the Changes clause on the ground that it had incurred additional costs as a result of defective specifications and improper inspections. The contracting officer refused and the Armed Services Board of Contract Appeals denied plaintiff's appeal. In this court plaintiff challenged the board's decision and asserted alternatively that it was entitled to recover on the same facts on a theory of breach of contract. The court held:
>
> > Since its claims were entirely redressable under the contract, however, plaintiff is limited to that relief. It cannot maintain a separate breach of contract ac-

> tion which seeks no further or different relief. [Citing cases.]
>
> *Id.* at 502, 405 F.2d at 1287.
>
> We adhere to the view stated in *Foster*. Where a plaintiff, in a Government contract case, states a claim which is fully redressable under the contract, the plaintiff cannot be permitted to maintain a separate claim for breach which is merely a recharacterization of the claim which is redressable under the contract. To allow a plaintiff to maintain such a claim would amount to subversion of the *Utah* decision.
>
> We would be inclined to view the present case as indistinguishable from *Foster* if it were not for the fact that, in our opinion, plaintiff's claim, when characterized as a change (as in Count I), is not redressable under the Changes clause because it alleges a cardinal change.

(at pp. 807-08; 369)

We interpret the above language to mean that the Court is of the view that even though there is an allegation of the breach of the duty to disclose superior knowledge, which it has held amounts to a breach of contract, that fact will not prohibit the matter from being disposed of under the contract as a change, in a proper case.

What we have said, of course, is that all of appellant's allegations, except two, are remediable under the terms of the contract. We look to our practice and that of other boards to ascertain whether appellant's allegations are remediable under the contract.

We believe that we are correct in doing so. In *E.R. McKee d/b/a E.R. McKee Construction Company v. United States*, 205 Ct. Cl. 303, 500 F.2d 525 (1974) the Court of Claims said:

> In determining whether a claim is administratively redressable by way of an equitable adjustment under the Changes article, the Court will give weight to the practice adopted by the agency itself and its contract appeals board. *Schlesinger v. United States*, 181 Ct. Cl. 21, 26-27, 383 F.2d 1004, 1007 (1967). (at p. 327; 538)

In the *Sol O. Schlesinger* case cited by the Court of Claims in *E.R. McKee, supra*, the Court said:

> Equally precluded in plaintiff's argument that we may now assess the merits of his claims independent of their administrative resolutions—that is, that we may treat them as 'breach' claims. That prerogative normally obtains only where the claim—by its basic nature—falls ouside the scope of the 'disputes' clause, *i.e.*, where the controversy relates to matters which cannot be handled under one or more of the standard adjustment clauses such as the 'changes' or 'changed conditions' clauses. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966). Admittedly, neither of these clauses points with unerring certainty to the scope of their coverage, and disputes, such as plaintiff's (dealing with the taking of erroneous discounts), might arguably be viewed as pure breach claims. Nevertheless, we directed plaintiff to seek out administrative relief because the matter of claim denomination is a subject that is better settled in the light of accepted administrative practices than through the reflections of abstract analysis. The availability of administrative relief—evidenced by numerous board decisions entertaining claims concerning improperly taken discounts, *e.g.*, *Resolute Paper Prods. Corp.*, 57-2 BCA ¶1394 (ASBCA); *Carolina Paper Mills, Inc.*, 58-2 BCA ¶1832 (ASBCA); *Crown Coat Front Co.*, 61-2 BCA ¶3157 (ASBCA)—was the func-

> tional basis of our order of May 10, 1963; we reaffirm our rejection of plaintiff's 'breach' argument by again pointing to the teachings of settled administrative practice.

(at pp. 26-27; 1007)

As pointed out above, in appellant's Motion for Reconsideration it said:

> The Contract Disputes Act of 1978, provides for appeal for breach of contract, reformation and/or recision [sic] including without limitation, breach of implied warranties recognized by the United States Court of Claims as follows:
>
> (1) Implied warranty of the adequacy of specifications.
>
> (2) Implied warranty of the duty to disclose superior knowledge.
>
> (3) Implied warranty to act with reasonable diligence.
>
> (4) Implied warranty not to hinder the performance of the other party.

This Board and others have, over the years, granted relief to contractors on a constructive change basis[2] for violation of the above implied warranties and others not listed as well. We conclude that in this area there is a "settled administrative practice." It is on the basis of this settled administrative practice that we have concluded that all of the allegations are redressable under the contract.

An exhaustive recitation of the opinions which have become the body of the "settled administrative practice" is not necessary here but a representative sample will demonstrate the point.

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[2]Not always, to be sure, with unanimity as to the basis for the action.

As to the implied warranty of the adequacy of specifications, the cases are numerous. One of the first cases, which has been cited with approval and in recognition of our practice by the Court of Claims, was *J.W. Hurst & Son Awnings, Inc.*, ASBCA No. 4167, 59-1 BCA ¶ 2095. We said:

> . . . We have held that where a contracting officer requires a contractor to perform work not called for under the terms of its contract, his order to perform such work constitutes a change in the work called for under the contract entitling the contractor to an equitable adjustment in contract price in accordance with the provisions of the 'Changes' article . . . Faulty design and mistakes in specifications causing extra work have been held to provide a basis for price adjustment under the 'Changes' clause, . . . even though the change constituted a relaxation of the specifications to achieve an attainable result . . . Where, as here, the change is necessitated by defective specifications and drawings, the equitable adjustment to which a contractor is entitled must, if it is to be equitable, i.e., fair and just, include the costs which it incurred in attempting to perform in accordance with the defective specifications and drawings . . . Under these circumstances the equitable adjustment may not be limited to costs incurred subsequent to the issuance of the change orders.

(at pp. 8964-65)

The Court of Claims has agreed with this approach. In *Hol-Gar Manufacturing Corporation v. United States*, 175 Ct. Cl. 518, 360 F.2d 634 (1966) the Court said:

> The Armed Services Board of Contract Appeals has recognized the correctness of the allowance of costs incident to an attempt to comply with defective spec-

ifications. See, e.g., *J.W. Hurst & Son Awnings, Inc.* . . .

* * *

> We hold that a plaintiff is entitled to an equitable adjustment which will compensate it for the costs which it incurred in trying to perform in accordance with the original specifications that turned out to be defective.

(at pp. 524/ 638)

A few years later, the Court of Claims said in *L.W. Foster Sportswear Co., Inc. v. United States*, 186 Ct. Cl. 499, 405 F.2d 1285 (1969):

> It is now familiar law that a contractor is entitled to an equitable adjustment under the Changes article for increased costs of performance due to defective specifications. *Bell v. United States, ante*, at 199, 200, 404 F.2d 975, 981; *Red Circle Corp. v. United States*, 185 Ct. Cl. 1, 12, 398 F.2d 836, 841-42 (1968); *Centre Mfg. Co., Inc. v. United States, supra*, 183 Ct. Cl. 115, 121, 136, 392 F.2d 229, 232-33, 241 (1968); *Maxwell Dynamometer Co. v. United States*, 181 Ct. Cl. 607, 634, 386 F.2d 855, 872 (1967); *Hol-Gar Mfg. Corp. v. United States*, 175 Ct. Cl. 518, 524, 360 F.2d 634, 638 (1966); *J. D. Hedin Constr. Co., Inc. v. United States*, 171 Ct. Cl. 70, 85-86, 347 F.2d 235, 246 (1965).

(at pp. 507-08; 1290)

It is thus abundantly clear that for a breach of implied duty to provide adequate (non-defective) specifications a remedy under the contract is available.

We conclude, too, that there is a "settled administrative practice" insofar as the breach of an implied duty to disclose superior knowledge is concerned. This and other boards have, for over fifteen years, granted relief of various kinds under the contract where a violation of this duty had been involved. See *Johnson Electronics, Inc.*, ASBCA No. 9366,

65-1 BCA ¶ 4628; *Midvale-Heppenstall Company*, ASBCA No. 7525, 65-1 BCA ¶ 4629; *Federal Electric Corporation*, ASBCA No. 13030, 69-2 BCA ¶ 7792; *General Precision, Inc.*, ASBCA No. 12078, 70-1 BCA ¶ 8144; *Kaplan Contractors, Inc.*, GSBCA No. 2747, 70-2 BCA ¶ 8511; *Boland Machine & Manufacturing Co.*, ASBCA No. 13664, 70-2 BCA ¶ 8556; *Stanwick Corporation*, ASBCA No. 16113, 72-1 BCA ¶ 9285; *Norair Engineering Corporation*, GSBCA No. 2394, 72-1 BCA ¶ 9305; *Ortronix, Inc.*, ASBCA No. 12745, 72-2 BCA ¶ 9564; *National Radio Company*, ASBCA No. 14707, 72-2 BCA ¶ 9486; *Lear Siegler, Inc.*, ASBCA No. 16079, 73-1 BCA ¶ 10,004; *Elrich Construction Company*, GSBCA No. 3657, 73-2 BCA ¶ 10,187; *Slocomb Corporation*, ASBCA No. 16715, 73-2 BCA ¶ 10,209; *Koppers Company*, ENGBCA No. 3033, 73-2 BCA ¶ 10,237; *Power City Electric, Inc.*, IBCA 950-1-72, 74-1 BCA ¶ 10,376; *Piracci Construction Company*, GSBCA No. 3715, 74-2 BCA ¶ 10,719; *Walden Landscape Company*, ENGBCA No. 3534, 75-2 BCA ¶ 11,538; *Nab-Lord Associates*, PSBCA No. 318, 77-2 BCA ¶ 12,802; *Telline Radio, Inc.*, ASBCA No. 20564, 78-1 BCA ¶ 12,915; *James E. McFadden, Inc.*, ASBCA No. 22496, 79-1 BCA ¶ 13,768.

In *Midvale-Heppenstall, supra*, we said

> By remaining silent on its exclusively held knowledge that ordinary ordnance steels were not satisfactory for this production, while knowing that the appellant had proposed and contracted to use such steel, the Government misled the appellant into making a disastrous bargain. The Government thereby assumed the risk that the contract might be impossible to perform. *Helene Curtis Industries, Inc. v. United States*, Ct. Cl. 6 February 1963. When it proved to be so, the reason for

the default was an act of the Government which excuses the appellant under the standard Default clause.

The appeal is sustained. The termination of the contract will be considered to have been for the convenience of the Government, and the parties will proceed accordingly.

(at p. 22,116)

In one of this Board's most recent cases we said:

In our opinion the disassembly sequence described by Mr. McLaughlin was superior technical knowledge possessed by the Government, needed by appellant, which appellant could not reasonably be expected to have discovered for itself, and which the Government was obligated to disclose prior to the time appellant undertook performance. *Helene Curtis Industries, Inc. v. United States*, [9 CCF § 71,992] 160 Ct. Cl. 437, 312 F.2d 774 (1963); *Telline Radio, Inc.*, ASBCA No. 20564, 78-1 BCA ¶ 12,915.

* * *

We conclude that the fishplate repair operation involved in the instant claim was occasioned by a combination of the Government's failure to disclose its superior knowledge regarding the disassembly sequence, and the failure to [sic-of] the contract documents to disclose variations in bolt hole locations and diameter which appellant reasonably assumed would be uniform. Accordingly, appellant is entitled to additional compensation.

(*James E. McFadden, Inc.*, 79-1 BCA ¶ 13,708 at pp. 67,454-55)

We acknowledge that there are Court of Claims cases which treat the withholding of superior knowledge as a breach of contract. Perhaps the foremost of these is *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963) although it is not the first in which the

Court discussed the theory. See also, *J.A. Jones Construction Company v. United States*, 182 Ct. Cl. 615, 390 F.2d 886 (1968); *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 458 F.2d 1368 (1972).

It is not surprising that the Court of Claims held that there had been a breach of contract when the Government withheld knowledge which it had, the contractor did not and which it needed. The *Helene Curtis* case was filed directly in the Court on a breach of contract theory and thus cannot be cited for the proposition that a failure to disclose superior knowledge cannot also be found to be remediable under the contract on a constructive change basis.

Appellant, in its Motion for Reconsideration, said:

> In addition to those United States Court of Claims decisions cited in the Complaint, Appellant will rely on the decision by Trial Judge Spector, in *American Ship Building Company v. United States*, Ct. Cl. Tr. Div. No. 225-74, June 9, 1980, wherein the United States Court of Claims determined that the failure by the Government to disclose material information to perspective contractors about the cost and risk of contract performance renders the Government liable for breach of contract, citing *Helene Curtis Industries v. United States*, 312 F.2d 778 (1963).

Aside from any question as to the efficacy of the Order of the Trial Judge in the absence of action by the Judges of the Court adopting and confirming it, we must point out again that that case was one filed directly in the Court of Claims on a breach of contract theory. It thus cannot be cited as authority for the proposition that a breach of a duty to disclose superior knowledge cannot be remedied on a constructive change theory in an action before an administrative tribunal. We note, too, in passing that Trial Judge Spector cited two of this Board's cases, in footnotes, in

which we found failures to disclose information and provided a remedy for this failure under the terms of the contract.

We conclude that in the area of the breach of a duty to disclose superior knowledge no different rule need be applied than that which has been sanctioned by the Court of Claims regarding breach of a duty to provide specifications which are not defective. In other words, the Court of Claims has recognized the application of the constructive change theory in defective specification situations and no reason exists to preclude the application of the same theory in withholding of information cases.

The last two of the implied duties listed by appellant in its Motion for Reconsideration, i.e., implied warranty to act with reasonable diligence and implied warranty not to hinder the performance of the other party, are really two branches of the same family of implied duties. This is a large family with many members and can perhaps best be described, as it was in *Lewis-Nicholson, Inc. v. United States*, 213 Ct. Cl. 192, 550 F.2d 26 (1977) as a

> . . . contractual obligation not to prevent, interfere with, or unreasonably delay the contractor's performance.

(at p. 194; 26-27)

This and other Boards have held in many cases over a period of about twenty-five years that a failure to fulfill a duty not to prevent, interfere with or unreasonably delay the contractor's performance was remediable under the constructive change doctrine or theory.

In *CFR, a Joint Venture of CEMCO, Inc., and R.F. Communications*, ASBCA No. 18748, 76-2 BCA ¶ 12,129, we said:

> The Government's lack of cooperation with appellant not only delayed performance of the prime contract by appellant for three months but had the additional effect of compelling appellant to complete the modulator-synthesizer work through a subcontractor of the Government's selection. The Government's action constituted a constructive change order entitling appellant to an equitable adjustment in the contract price.

(at p. 58,290)

The cases reaching similar results are too numerous to list but a partial listing may be beneficial in showing that here, too, there is a "settled administrative practice." See *Chris Berg, Inc.*, ASBCA No. 3466, 58-1 BCA ¶ 1792; *F. Burke Engineering and Construction Company*, ASBCA No-8182, 1963 BCA ¶ 3713; *Karnavas Painting Company*, NASA BCA No. 28, 1963 BCA ¶ 3633; *John M. Bragg*, ASBCA No. 9515, 65-2 BCA ¶ 5050; *Stanley W. Wasco*, ASBCA No. 12288, 68-1 BCA ¶ 6986; *Space Dynamics Corporation*, ASBCA No. 12085, 69-1 BCA ¶ 7662; *Nanofast, Inc.*, ASBCA No. 12545, 69-1 BCA ¶ 7566; *Galloway Company*, ASBCA No. 16656, 73-2 BCA ¶ 10,270; *Nicholas Dynamics, Inc.*, ASBCA No. 17949, 75-2 BCA ¶ 11,556; *R. L. Spencer Construction Company, Inc.*, ASBCA No. 18450, 75-2 BCA ¶ 11,604, *Raby Hillside Drilling, Inc.*, ASBCA No. 20178, 76-2 BCA ¶ 11,982; *Hensel-Phelps Construction Company*, ENGBCA No. 3674, 77-1 BCA ¶ 12,475; *Murdock Construction Company*, IBCA No. 1050-12-74, 77-2 BCA ¶ 12,728.

It is indisputable that the Court of Claims has recognized the applicability of the constructive change doctrine to this type of implied duty. In *Lee Hoffman v. United States*, 166 Ct. Cl. 39, 340 F.2d 645 (1964) the Court of Claims recognized that a breach of the implied duty to cooperate and to administer the contract in such a manner as does not

hinder, delay or increase the costs of performance gave rise to a changed condition entitling the contractor to an equitable adjustment under the contract's Differing Site Conditions clause. In another Court of Claims case the Court held that an arbitrary exercise of a discretionery function authorized the contractor to relief under a constructive change order. *Fox Valley Engineering, Inc. v. United States*, 151 Ct. Cl. 228 (1960). See also *W. G. Cornell Company v. United States*, 179 Ct. Cl. 651, 376 F.2d 299 (1967).

The Court of Claims has recognized overzealous inspection as a constructive change under the "Changes" clause. *Herman Adams, Doing Business as Adams Manufacturing Company v. United States*, 175 Ct. Cl. 288, 358 F.2d 986 (1966). In two other Court of Claims cases the Court found constructive changes arising out of inspections. In *N. Fiorito Company v. United States*, 189 Ct. Cl. 215, 416 F.2d 1284 (1969) the improper performance of an inspection function was involved. In *Southwest Welding & Manufacturing Company v. United States*, 188 Ct. Cl. 925, 413 F.2d 1167 (1969) the contract spelled out the required inspection procedure but the Government required an additional inspection not called out.

The above samples from many Court of Claims cases applying the constructive change doctrine suffice to establish that the doctrine is properly for application by boards of contract appeals in appropriate circumstances.

We thus, in summary, conclude that where a claim is redressable under the terms of the contract on a constructive change basis it is not also remediable on a breach of contract basis and only one cause of action, arising under the contract, remains.

This latter conclusion may also be arrived at by a different, and alternative, route. Assuming that two separate

causes of action based upon the same facts are possible, does it follow that a contractor may pursue both at the same time? We think not and we believe that there is support for our conclusion to be found in the opinion in *Edward R. Marden Corporation v. United States*, 194 Ct. Cl. 799, 442 F.2d 364 (1971). In that case the contractor had claimed before this Board that it was entitled to an equitable adjustment under the contract. We denied appellant's claim on the basis of the Permits and Responsibilities article of the contract holding that there was no valid ground for relieving the contractor of the normal builder's risk liability. In the Court of Claims the contractor presented two Counts. Count I sought $3,700,000 as an equitable adjustment under the Changes clause. Court (sic) II, incorporating by reference the factual allegations of Count I, sought $3,700,000 on breach of contract premised on the withholding of superior knowledge. The Court found that "[b]oth counts set forth essentially the same claim" (at pp. 807; 368). For our purpose here, we need not be concerned with how the Court reached its conclusion that:

> Since we have found that plaintiff's claim, as expressed in Count I, is not encompassed by the Changes clause and we know of no other contract adjustment provision under which Count I would be redressable, we must necessarily conclude that the claim is not redressable under the contract. The board, therefore, was without jurisdiction to consider the claim. Even though the board evidently was of the opinion that the claim was properly before it, its findings of fact on that claim were gratuitous and such findings do not preclude or limit a trial de novo on the merits of Count II in this court. *See Air-A-Plane Corp. v. United States, supra* note 3; *Morrison-Knudsen Co. v. United States*, 170 Ct. Cl. 757, 764, 345 F.2d 833, 838 (1965).

> Plaintiff has not moved for a de novo trial on Count I. Needless to say, however, in disposing of plaintiff's motion on Count II we have, in effect, held that a de novo trial on Count I would be proper because it alleges a cardinal change. In view of the circumstances we deem it appropriate to consider the two counts as merged into one count for breach of contract.
>
> III
>
> We thus hold that plaintiff's Count II is not redressable under the contract and that the board's findings with respect to the claim alleged in Count I were gratuitous and in no way preclude or limit a de novo trial on Count II in this court. Further, because Count I alleges a cardinal change, we hold that the two counts are merged into one count for breach of contract.

(at pp. 810-11; 370)

What the Court did was to take two claims (Counts), both of which it held were proper, and merge them into one Count for breach of contract. If one wishes to maintain that appellant has two proper allegations in the instant case, then the *Marden* case is authority for the proposition that those two separate allegations can be and should be merged into one Count. That is what we have done in the instant case though, of course, our merger was the other way around, i.e., the breach of contract claim into the constructive change claim.

Appellant asks the Board whether we are dismissing appellant's breach of contract claims with prejudice.[3] We are

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[3]Apparently appellant concludes that if we are dismissing those claims with prejudice it will have exhausted its administrative remedies and may proceed directly to the Court of Claims. Appellant may, of course, proceed to the Court of Claims whenever it likes. It is within the province of that forum to determine whether appellant has the legal right to be there at that point in time and as to whether the Court will act upon the petition and, if so, in what manner.

not dismissing appellant's breach of contract claims in any manner, with or without prejudice. We are simply taking alternative views regarding them. First, we believe that appellant has only two breach of contract claims since all of its allegations, except those two, are remediable under the terms of the contract and thus do not amount to breaches of contract. The alternative view is that the breach of contract claims remediable under the contract are simply merged into the claims arising under the contract and cease to exist. Either way, the only allegations to be tried are those arising under the contract, either directly under a contract provision or through application of the constructive change doctrine, except for the two allegations we have concluded are properly subject to processing under the Contract Disputes Act of 1978.

Appellant has also raised, not in the Motion for Reconsideration, but in a telephone conference, regarding the motion, between appellant's counsel, respondent's counsel and the administrative judge responsible for this appeal, the question of the effect of our ruling on the right of appellant to avail itself of the subpoena power granted to the boards of contract appeals by the Contract Disputes Act of 1978. Because of the lengthy delays which have already been incurred in the processing of these appeals and because we know now that the issue will be raised as soon as this opinion is issued, we have decided to rule upon appellant's informally presented request.

Appellant wishes to use that subpoena power to summon witnesses and documents to the hearing. It seeks to use that power for all of its claims, i.e., those involved in the pre-Contract Disputes Act of 1978 case (ASBCA No. 23689) and those involved in the Contract Disputes Act of 1978 case (ASBCA No. 24564).

The Attorney General of the United States has ruled that the subpoena authority granted by Congress to boards of contract appeals in the Contract Disputes Act of 1978 may be exercised only in cases within the purview of that Act. We thus may issue subpoenas only in ASBCA No. 24564 and, of course, only as to claims involved in that appeal. The other claims, i.e., those in ASBCA No. 23689, are not within the purview of the Contract Disputes Act of 1978 and we may not issue subpoenas regarding them. We may, and will request, through the Attorney General of the United States, the issuance of subpoenas by Federal District Court Judges pursuant to our practice under 5 U.S.C. § 304. We have previously given the necessary guidelines for the invocation of this procedure to appellant. Upon receipt of appellant's requests, if they contain the necessary information, we will promptly seek the issuance of the subpoenas.

We have carefully reviewed appellant's Motion for Reconsideration and find that there is no basis for us to change our original decision. Our original decision is affirmed.

Dated 31 March 1981.

/s/ Basil S. Norris
BASIL S. NORRIS
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*

/s/ Jacob L. Burch
JACOB L. BURCH
Administrative Judge
Member of Division No. 1
Armed Services Board of

Contract Appeals

I *concur*
/s/ Harris J. Andrews
HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I *concur*
/s/ Daniel M. Arons
DANIEL M. ARONS
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA No. 24564, Appeal of Johnson & Son Erectors, on Motion for Reconsideration, rendered in conformance with the Board's Charter.

Dated: 17 APR 1981

/s/ George L. Hawkes
GEORGE L. HAWKES,
Recorder
Armed Services Board of
Contract Appeals

APPENDIX C.

Opinion by Administrative Judge Norris on Government Motion to Dismiss.

EXHIBIT A.

ARMED SERVICES BOARD OF CONTRACT APPEALS.

Appeal of —
Johnson & Son Erectors Company
Under Contract No. F35610-76-C-0100.
ASBCA No. 24564.

APPEARANCES FOR THE APPELLANT:
Dean Francis Pace, Esq.
Pace & Johnson
Los Angeles, California.

APPEARANCES FOR THE GOVERNMENT:
Colonel John T. Murphy, USAF
Chief Trial Attorney
Major J. Hatcher Graham, USAF
Trial Attorney

The Government has moved to dismiss this appeal on the ground that it is merely duplicative of ASBCA No. 23689 which was filed earlier by appellant.

Contract No. F35610-76-C-0100 was awarded to appellant on 29 August 1975. The contract required the installation of a bag-house in connection with the heating plant at Kingsley Air Force Base, Oregon. Several disputes ensued under the contract between the parties and appellant submitted a claim to the contracting officer. On 13 February 1979, the contracting officer issued his final decision denying an equitable adjustment. An appeal from this final

decision was docketed by the Board on 14 March 1979, after the effective date of the Contract Disputes Act of 1978 (hereinafter sometimes simply the Act).

Appellant filed a complaint at the same time it filed its notice of appeal and in the complaint sought to elect to have its appeal processed pursuant to the Act. The Board ruled that inasmuch as the claim was not pending before the contracting officer on 1 March 1979 appellant could not make such an election.

In December 1979, appellant presented the identical, or essentially identical, claim to the contracting officer as a breach of contract claim seeking reformation or rescission as well as breach of contract damages. The contracting officer refused to issue a final decision alleging that a final decision on the identical claim had already been issued and was then pending before the Board. Appellant appealed from that refusal to issue a final decision and, in doing so, elected to proceed under the Act.

Respondent argues that certain decisions of this Board[1] mandate the dismissal of this appeal because the dispute was decided by the contracting officer prior to 1 March 1979 and thus was not one in which appellant could elect to proceed under the Contract Disputes Act. Respondent also argues that appellant's election is nothing but a subterfuge appellant seeks to employ in order to obtain the benefit of the Board's Contract Disputes Act subpoena powers. Counsel also argues that to permit appellant to refile a claim asserting equitable remedies would permit it to circumvent the Act and make a mockery of the effective date provisions of the Act.

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[1] *E-Systems, Incorporated*, ASBCA No. 21091, 79-1 BCA ¶ 13,806; *Monaco Enterprises, Incorporated*, ASBCA No. 23611, and *Towne Realty, Incorporated*, ASBCA No. 23676, 79-2 BCA ¶ 13,944.

We need not be concerned with appellant's motives in pursuing the course of action it has, but only whether the course is legal. Some of our earlier decisions anticipated the scenario which has unfolded in this appeal and pointed to the result which we reach.

We said in *Cincinnati Electronics Corporation*, ASBCA No. 23742, 79-2 BCA ¶ 14,145:

> More pertinent are the Board's decisions in *E-Systems, Incorporated*, ASBCA No. 21091, 79-1 BCA ¶ 13,-806; *Starlight Services, Inc.*, ASBCA No. 22894 79-1 BCA ¶ 13,743, and *Handy Tool and Manufacturing Co.*, ASBCA No. 22659, 79-1 BCA ¶ 13,723 [aff'd on mot. for recon., 79-1 BCA ¶ 13,872]. These decisions show that, where claims are no longer pending before a contracting officer, but are pending only before the Board on the effective date of the Act, a contractor may not elect to proceed under the Act in that appeal proceeding; and, if such appeals involve breach or reformation claims the Board does not have jurisdiction over them. But those decisions also show that such claims, i.e., those not cognizable by the contracting officer or the Board under the Disputes article, may be 'initiated thereafter' so as to permit processing under the Act. The clear rationale for such a procedure is that breach or reformation claims asserted prior to 1 March 1979 were not properly pending before contracting officers or Boards under the Disputes article. But as of 1 March 1979, such claims may be initiated before the contracting officer and appealed to the Board under the Act.

Appellant's course of action is authorized by the Act as an action "initiated thereafter," i.e., after the effective date of the Act. The claims in the two appeal are not identical since they allege different theories of recovery.

Respondent's motion to dismiss ASBCA No. 24564 is denied.

Dated 3 June 1980.

/s/ Basil S. Norris
BASIL S. NORRIS
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ Jacob L. Burch
JACOB L. BURCH
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ F. Ned Hand
F. NED HAND
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ Harris J. Andrews, Jr.
HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I *concur*
/s/ Daniel M. Arons
DANIEL M. ARONS
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the decision and opinion On Government Motion to Dismiss of the Armed Services Board of Contract Appeals in ASBCA No.

24564, Appeal of Johnson & Son Erector, Company, rendered in conformance with the Board's Charter.

Dated: 12 JUN 1980

/s/ George L. Hawkes
GEORGE L. HAWKES,
Recorder
Armed Services Board of
Contract Appeals.

Decision on Respondent's Motions to Dismiss and/or Strike and for Summary Judgment.

EXHIBIT B.

Armed Services Board of Contract Appeals.

Appeals of — Johnson & Son Erectors Company, Under Contract No. F35610-76-C-0010. ASBCA Nos. 23689 and 24564.

Appearances for the Appellant: Dean Francis Pace, Esq., Pace & Johnson, Los Angeles, California.

Appearances for the Government: Colonel John T. Murphy, USAF, Chief Trial Attorney; Major J. Hatcher Graham, USAF, Senior Trial Attorney.

BACKGROUND

Respondent awarded Contract F35610-76-C-0010 to appellant on 28 August 1975. The parties found themselves in dispute on a number of matters during the period of contract performance. On 30 May 1978 appellant filed a claim against respondent. The contracting officer issued a final decision on 13 February 1979 prior to the effective date of the Contract Disputes Act of 1978. Appellant's appeal from this final decision was filed with the Board on 14 March 1979 after the 1 March 1979 effective date of the Contract Disputes Act of 1978. This appeal was assigned ASBCA No. 23689.

At the same time that the notice of appeal was filed, appellant filed a complaint which sought relief under theories of breach of contract, rescission, reformation and for equitable adjustment under the contract. Appellant sought in the complaint to have its appeal processed under the Contract Disputes Act of 1978 and pursuant to that Act requested the Board to issue subpoenas for a number of government and non-government individuals. The Board

ruled that inasmuch as the claim was not pending before the contracting officer on 1 March 1979 appellant could not proceed under the Contract Disputes Act of 1978.

Thereafter in December 1979, appellant presented essentially the identical claims to the contracting officer seeking reformation or rescission as well as breach of contract damages. The contracting officer refused to issue a final decision on the basis that a final decision had already been issued on the identical facts and was before the Board as ASBCA No. 23689. Appellant filed a timely appeal from the refusal to issue a final decision and that appeal was docketed as ASBCA No. 24564. In that appeal, appellant elected to proceed under the Contract Disputes Act of 1978.

Respondent then sought the dismissal of ASBCA No. 24564 on the basis that it was duplicative of ASBCA No. 23689. On 3 June 1980 the Board denied respondent's motion holding that the claim for reformation, rescission and breach of contract damages had not been properly before the contracting officer before 1 March 1979 because they were not cognizable under the Disputes clause of the contract. We then held that pursuant to the portion of the Contract Disputes Act of 1978 which gave us jurisdiction for claims "initiated thereafter," *i.e.* after 1 March 1979, we had jurisdiction over claims for reformation, rescission and breach of contract damages.

Respondent, on 25 August 1980, filed a motion to dismiss ASBCA No. 23689 on the basis that it alleged breach of contract and since we had ruled in *Johnson & Son Erectors*, ASBCA No. 24564, 80-2 BCA ¶ 14,544 that ASBCA No. 23689 had not been pending before the contracting officer on 1 March 1979 and appellant could not proceed under the Contract Disputes Act of 1978 we had no jurisdiction to grant relief. In the alternative, respondent requested that all references to breach of contract and relief thereunder be

stricken from the complaint in ASBCA No. 23689. Appellant opposed the motion on the basis that the Board has concurrent jurisdiction under the Disputes clause and the Contract Disputes Act of 1978. Further, appellant argued that the jurisdiction of the Board for breach of contract claims had been decided in *Johnson & Son Erectors*, ASBCA No. 24564, 80-2 BCA ¶ 14,544.

On 12 November 1980 respondent filed a motion for summary judgment in ASBCA No. 24564. The basis for the motion is succinctly stated by Government counsel in his Memorandun in Support of Respondent's Motion for Summary Judgment as follows:

> . . . Those matters that were within the Board's jurisdiction prior to the Act are not, by definition,* breaches of contract and must be heard under ASBCA No. 23689. Only those alleged acts which were, by definition, breaches of contract survived the transition from limited pre-Act jurisdiction to the expanded jurisdiction under the Act. Therefore only those acts which constitute a breach of contract pursuant to the Court of Claims' and Appeal Boards' determinations may be heard under ASBCA No. 24564 . . . .

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*Respondent, relying upon *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966); *International Telephone and Telegraph Corporation*, ASBCA No. 22378, 79-1 BCA ¶ 13,816; *Industrial Investment Corporation*, ASBCA No. 21274, 77-1 BCA ¶ 12,512; *General Dynamics Corporation v. United States*, 558 F.2d 985 (1977); *Kisco Co., Inc. v. United States*, 610 F.2d 742 (1979) defines the difference between a breach of contract claim and an equitable adjustment claim as whether or not there is a clause in the contract that provides a remedy for the alleged cause of action. If there is such a clause, the Board has jurisdiction and the alleged act is not a breach of contract. Conversely, if there is not such a clause, the Board has jurisdiction and the alleged act is not a breach of contract. Conversely, if there is not such a remedy granting clause the alleged act is a breach of contract and the Board does not have jurisdiction.

Proceeding from the above thesis, respondent's counsel has analyzed each paragraph of appellant's First Amended Complaint and has concluded that only one paragraph, *i.e.* 5.4, alleges facts which if true would amount to a breach of contract. He also concludes that there is one paragraph, *i.e.*, 1.2, involving a matter which has not clearly or uniformly been held to be either a breach of contract or a constructive change and that the allegation could be proper under either one of the ASBCA numbers.

Respondent's counsel has concluded that paragraph 1.1 of the amended complaint alleges ambiguous specifications and that such an allegation, if proved, would warrant an equitable adjustment under the Changes clause of the contract. Our independent analysis of this paragraph leads us to the same conclusion.

We have already discussed paragraph 1.2 of the amended complaint. This is the paragraph that alleges the withholding by the government of superior knowledge. It also alleges a violation by the Government of the procurement regulations. We do not agree with respondent's counsel regarding the withholding of superior knowledge. If such allegation is proved, it is remediable under the contract as a constructive change. The allegation regarding the Government's supposed violation of the procurement regulations appears to be one which, if established, would amount to a breach of contract and, perhaps, call for rescission or reformation action.

We note that in *Hughes Aircraft Company*, ASBCA No. 21429, 79-1 BCA par. 13,641, *affirmed on recon.*, 80-1 BCA par. 14,329 we spoke in terms of a Department of Defense Instruction as governing the interpretation of the contract. But in *Hughes* the applicable provisions of the Armed Services Procurement Regulations were incorporated into the contract provisions and it was clear that the DoD

Instruction was issued to implement the ASPR just as part of ASPR was issued to implement the Foreign Military Sales Act. There ASPR was part of the contract, here it was not.

In paragraph 1.3 appellant alleges practical impossibility of performance for a small business concern. Respondent's counsel concludes and we agree, that allegations of this kind fall within the constructive change family and are thus capable of being remedied under the provisions of the Changes clause.

Paragraph 1.4 is, according to respondent's counsel, merely another allegation of defective specifications and, as such, capable of being remedied on a constructive change basis pursuant to the Changes clause. Our independent review of the allegation and the law on the point leads us to the conclusion that respondent's counsel's analysis is correct.

Paragraph 1.5 may properly be considered as a prayer for damages for delay and disruption arising out of the alleged defective specifications.

Paragraphs 2, 3 and 4 all, according to respondent's counsel, allege defective specifications and are thus remediable under the contract's Changes clause on the basis of the constructive change doctrine or theory. Our independent review of these paragraphs leads us to the same conclusion as that of government counsel.

As we have found above, government counsel concedes that the delay alleged in paragraph 5.4 would, if proved, be a breach of contract since the contract did not contain a Government Delay of Work clause. We have carefully reviewed the allegation and the law and reach the same conclusion. In paragraph 5.5 appellant complains of a delay arising out of the allegedly defective specifications. This

delay can be remedied under the terms of the contract by resort to the constructive change theory.

In paragraphs 6.0 through 6.9 appellant alleges constructive changes under the terms of the contract.

In paragraph 7 appellant alleges a breach of contract by the assessment of liquidated damages when appellant was entitled to an equitable adjustment under the terms of the Changes clause.

DECISION
ASBCA No. 23689

Respondent's motion to dismiss is denied. It is clear that under ASBCA No. 23689 allegations have been made which, if proved, would entitle appellant to an equitable adjustment in accordance with the terms of the contract. It would, therefore, be inappropriate to dismiss the appeal.

Respondent's alternative motion to strike all allegations of breach of contract from ASBCA No. 23689 is granted. ASBCA No. 23689 is a pre-Contract Disputes Act of 1978 appeal. As such, appellant is not entitled to proceed under the Act and the Board does not have any authority to exercise the expanded jurisdiction conferred upon it by the Congress. We had no jurisdiction in pre-Contract Disputes Act appeals to consider breach of contract claims and do not now have such jurisdiction in such appeals unless claims were presented to the contracting officer after 1 March 1979. In those cases, the contractor, and the contractor alone, can confer jurisdiction upon the Board by its election to proceed under the Contract Disputes Act of 1978. In the absence of such an election we still do not have the requisite jurisdiction.

In our view a motion for summary judgment is not appropriate for use under the circumstances. A motion for summary judgment is intended to finally dispose of a case before the tribunal to which it is directed. In *Bland v. Norfolk and Southern RR Company*, 406 F.2d 863 (1969) it was said that a motion for summary judgment is:

> . . . a device to make possible the prompt disposition of controversies *on their merits* without a trial, if in essence there is no real dispute as to the salient facts. (Emphasis supplied)

It is clear that here there is a real dispute as to essentially all of the material facts. In addition, the motion as framed does not seek a resolution of the merits of the claims but seeks instead a realignment of the claims in accordance with the mandates of the Contract Disputes Act of 1978 and other applicable law.

Insofar as the motion is for summary judgment, it is denied. However, in our view respondent's position is correct regarding the applicable law. We consider respondent's motion to be one seeking the striking from the complaint of all references to breach of contract claims where the identical factual situation is alleged as a constructive change claim under ASBCA No. 23689.

Whether one wishes to label it as a legal fiction or otherwise, it is now well-established in the area of Federal contract law that if there is a remedy-granting clause in the contract under which a contractor can recover, a dereliction by the government is not a breach of contract. We have gone through the amended complaint and have found that for almost all of the claims listed therein there is a clause in the contract which provides a means for an equitable adjustment, if appellant establishes its entitlement to an equitable adjustment. Since this is true, and assuming ad-

equacy of proof, a favorable decision for appellant would not establish breaches of contract but, rather, constructive changes.

We, therefore, order that all breach of contract allegations in the amended complaint be stricken from the complaint except that in paragraph 1.2 relating to government violation of procurement regulations and those in paragraph 5.4.

The allegation in paragraph 5.4 properly alleges a breach of contract since there is no remedy-granting clause in the contract if appellant can establish government delay as alleged. The allegation in paragraph 1.2, depending upon proof, may call for rescission or reformation action.

In accordance with this opinion, and as prescribed by Board Rule 6(a), appellant is to prepare and submit, within thirty days of the date of its receipt of this document, a revised complaint in ASBCA No. 23689 in which it sets forth simple, concise and direct statements of each of its claims for equitable adjustments under the terms of the contract omitting all references to and quotations from Court of Claims and Boards of Contract Appeals opinions. Such references and quotations serve no useful purpose in a complaint.

Additionally, appellant is to prepare and submit, within thirty days of the date of its receipt of this document, a revised complaint in ASBCA No. 24564 in which it sets forth a simple, concise and direct statement of its breach of contract claims omitting all references to and quotations from Court of Claims and Boards of Contract Appeals

opinions. Such references or quotations serve no useful purpose in a complaint.

Dated 30 December 1980.

/s/ Basil S. Norris
BASIL S. NORRIS
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ Jacob L. Burch
JACOB L. BURCH
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ Harris J. Andrews, Jr.
HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I *concur*
/s/ Daniel M. Arons
DANIEL M. ARONS
Administrative Judge
Vice Chairman, Armed
Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 23689 and 24564, Appeal of Johnson & Son Erectors Company, rendered in conformance with the Board's Charter.

Dated: 27 JAN 1981

/s/ George L. Hawkes
GEORGE L. HAWKES,
Recorder
Armed Services Board of
Contract Appeals.

APPENDIX D.

Opinion by Administrative Judge Norris on Government Motion to Dismiss.

ARMED SERVICES BOARD OF
CONTRACT APPEALS.

Appeal of —
Johnson & Son Erectors Company
Under Contract No. F35610-76-C-0100.
ASBCA No. 24564.

APPEARANCES FOR THE APPELLANT:
Dean Francis Pace, Esq.
Pace & Johnson
Los Angeles, California.
APPEARANCES FOR THE GOVERNMENT:
Colonial John T. Murphy, USAF
Chief Trial Attorney
Major J. Hatcher Graham, USAF
Trial Attorney.

The Government has moved to dismiss this appeal on the ground that it is merely duplicative of ASBCA No. 23689 which was filed earlier by appellant.

Contract No. F35610-76-C-0100 was awarded to appellant on 29 August 1975. The contract required the installation of a bag-house in connection with the heating plant at Kingsley Air Force Base, Oregon. Several disputes ensued under the contract between the parties and appellant submitted a claim to the contracting officer. On 13 February 1979, the contracting officer issued his final decision denying an equitable adjustment. An appeal from this final decision was docketed by the Board on 14 March 1979,

after the effective date of the Contract Disputes Act of 1978 (hereafter sometimes simply the Act).

Appellant filed a complaint at the same time it filed its notice of appeal and in the complaint sought to elect to have its appeal processed pursuant to the Act. The Board ruled that inasmuch as the claim was not pending before the contracting officer on 1 March 1979 appellant could not make such an election.

December 1979, appellant presented the identical, or essentially identical, claim to the contracting officer as a breach of contract claim seeking reformation or rescission as well as breach of contract damages. The contracting officer refused to issue a final decision alleging that a final decision on the identical claim had already been issued and was then pending before the Board. Appellant appealed from that refusal to issue a final decision and, in doing so, elected to proceed under the Act.

Respondent argues that certain decisions of this Board[1] mandate the dismissal of this appeal because the dispute was decided by the contracting officer prior to 1 March 1979 and thus was not one in which appellant could elect to proceed under the Contract Disputes Act. Respondent also argues that appellant's election is nothing but a subterfuge appellant seeks to employ in order to obtain the benefit of the Board's Contract Disputes Act subpoena powers. Counsel also argues that to permit appellant to refile a claim asserting equitable remedies would permit it to circumvent the Act and make a mockery of the effective date provisions of the Act.

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[1] *E-Systems, Incorporated*, ASBCA No. 21091, 79-1 BCA ¶ 13,806; *Monaco Enterprises, Incorporated*, ASBCA No. 23611, and *Towne Realty, Incorporated*, ASBCA No. 23676, 79-2 BCA ¶ 13,944.

We need not be concerned with appellant's motives in pursuing the course of action it has, but only whether the course is legal. Some of our earlier decisions anticipated the scenario which has unfolded in this appeal and pointed to the result which we reach.

We said in *Cincinnati Electronics Corporation*, ASBCA No. 23742, 79-2 BCA ¶ 14,145:

> More pertinent are the Board's decisions in *E-Systems, Incorporated*, ASBCA No. 21091, 79-1 BCA ¶ 13,806; *Starlight Services, Inc.*, ASBCA No. 22894 79-1 BCA ¶ 13,743, and *Handy Tool and Manufacturing Co.*, ASBCA No. 22659, 79-1 BCA ¶ 13,723 [aff'd on mot. for recon., 79-1 BCA ¶ 13,872]. These decisions show that, where claims are no longer pending before a contracting officer, but are pending only before the Board on the effective date of the Act, a contractor may not elect to proceed under the Act in that appeal proceeding; and, if such appeals involve breach or reformation claims the Board does not have jurisdiction over them. But those decisions also show that such claims, i.e., those not cognizable by the contracting officer or the Board under the Disputes article, may be 'initiated thereafter' so as to permit processing under the Act. The clear rationale for such a procedure is that breach or reformation claims asserted prior to 1 March 1979 were not properly initiated or properly pending before contracting officers or Boards under the Disputes article. But as of 1 March 1979, such claims may be initiated before the contracting officer and appealed to the Board under the Act.

Appellant's course of action is authorized by the Act as an action "initiated thereafter," i.e., after the effective date of the Act. The claims in the two appeal are not identical since they allege different theories of recovery.

Respondent's motion to dismiss ASBCA No. 24564 is denied.

Dated 3 June 1980.

/s/ Basil S. Norris
BASIL S. NORRIS
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ Jacob L. Burch
JACOB L. BURCH
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ F. Ned Hand
F. NED HAND
Administrative Judge
Member of Division No. 1
Armed Services Board of
Contract Appeals

I *concur*
/s/ Harris J. Andrews, Jr.
HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I *concur*
/s/ Daniel M. Arons
DANIEL M. ARONS
Administrative Judge
Vice Chairman, Armed
Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the decision and opinion On Government Motion to Dismiss of the Armed Services Board of Contract Appeals in ASBCA No. 24564, Appeal of Johnson & Son Erector, Company, rendered in conformance with the Board's Charter.

Dated: 12 JUN 1980

/s/ George L. Hawkes
GEORGE L. HAWKES,
Recorder
Armed Services Board of
Contract Appeals

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1982